

August 4, 1950

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ARIZONA ATTORNEY GENERAL

Mr. Barry DeRose
County Attorney
Gila County
Globe, Arizona

Dear Barry:

We have your letter of July 31, in which you request our opinion upon the following matter:

"Miami High School District No. 40 is now in the process of perfecting their plans preparatory to calling for bids on a new school gymnasium. They wish to avoid the necessity of advertising for bids for the erection of said building for forty days. The construction of the new building will not increase the indebtedness of the school district beyond four (4%) percent of the taxable value of property within the district.

I would appreciate it if you would inform me if the provisions of Section 10-610 Arizona Code Annotated are compulsory relative to the forty days' notice."

It is our opinion that the forty days' notice set forth in Section 10-610 ACA 1939 is mandatory and that any notice covering less time than forty days before the opening and receiving of bids would be defective and incomplete and contrary to law. The pertinent part of Section 10-610, as amended by Laws, 1950, Chapter 23, First Special Session, provides as follows:

"Erection of buildings for which bonds voted; method of payment. If such bonds are issued for the purpose of erecting and furnishing any public building, the board of supervisors, for a county or school district, and the governing body of a city, town, or other municipal corporation, shall adopt plans and specifications for such building, and as soon as practicable thereafter, advertise for bids for the erection and furnishing of said building, stating a day and hour, not less than forty days from the date of such notice, when said bids shall be received and opened. * * *"

We have been able to find only one Arizona case dealing with this statute. It is the case of Berryhill Office Equipment Co. v. Phillips, 35 Ariz. 180, 276 Pac. 4. In this case our court held that because the plans and specifications were not accessible for the full forty-day period but were only accessible for twenty-six days, an injunction should be granted to enjoin the Board of Supervisors from letting a contract to the low bidder. The court in regard to this matter said at page 190 of the state report:

"It seems to us that the notice by publication for the statutory period of forty days is not complete unless during such period the plans and specifications are on file in some accessible place. The authorities agree that such specifications should be made and adopted in advance of ordering the advertisement, and there would be no object in so doing, except that they might be available to bidders during the whole period of advertising. The advertised notice must either contain all the data necessary to inform the general public of what is wanted, or refer to specifications on file for such information, and if the latter method is adopted the notice would most certainly be defective and incomplete, unless the plans and specifications were on file for inspection during the whole period of publication."

It can be readily seen that if notice were given for a time less than forty days, the plans and specifications could not be accessible for the time prescribed by the statute as the same is construed by the court in the Berryhill case, and for this reason alone we believe that our conclusion can be justified. However, the court went on further in the Berryhill case and stated, at page 191:

" * * * Defendants now argue that was sufficient time for persons desiring to bid to inform themselves and prepare their bids; that all the law requires is that the specifications be accessible a reasonable length of time, and that twenty-six days is a reasonable time. But we think the statute has fixed what the lawmakers thought a reasonable time to advertise for bids at forty days, and that an advertisement for any less period would be insufficient."

(Emphasis supplied)

Barry DeRose
County Attorney, Gila County

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Although the words of the court set forth in the last quotation may be dicta, it will be noted that it is plainly stated that advertising for bids for a period less than forty days would be insufficient. Furthermore, a mere reading of the statute which uses the word "shall" seems to indicate that the statute is mandatory and allows no discretion in the Board of Supervisors to shorten the forty-day period of notice.

To the same general effect are the following sections of American Jurisprudence: 43 Am. Jur, Public Works and Contracts, Secs. 23, 24 and 25. These sections indicate that notice or advertising statutes relating to public works are usually "mandatory and peremptory" and must be complied with. They further state that failure to give notice or advertise as required by statute results in the right to injunctive relief against the letting of a contract based upon inadequate notice or advertisement.

We are enclosing for your convenience a copy of House Bill No. 64, passed by the First Special Session of the present Legislature.

We trust that this will serve to answer your inquiry, and with kindest regards, we remain

Very truly yours,

FRED O. WILSON
Attorney General

CALVIN H. UDALL
Assistant Attorney General

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